Politico, December 4, 2007

In contempt fight, Congress has options
By: Rep. Brad Miller

Disputes over information sought in congressional investigations are hardly new.

In past administrations, Congress and the president have postured and preened, announced that important principles were at stake, appealed to public opinion, accused each other of improper motives, gone to the brink of confrontation, and then compromised.

What is new, and frightening, is the Bush administration's determination to provoke a constitutional confrontation over the congressional investigation into the firing of nine U.S. attorneys.

The investigation has uncovered significant evidence of disturbing abuses of power in criminal prosecutions. Exposing and correcting abuses of power is Congress' job.

The Senate's investigation of the Teapot Dome scandal more than 80 years ago led to the question why the Justice Department had done nothing to expose and prosecute the secretary of the interior, among others, for defrauding the federal government.

The Supreme Court upheld the Senate's authority to hold a witness in contempt for refusing to

testify in the investigation.

The Senate regarded political influence in criminal prosecutions as "grave and requiring legislative attention and action."

The Supreme Court agreed and said that the question of whether the Justice Department's "functions were being properly discharged or being neglected or misdirected" was a subject "on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."

Today, sworn testimony and documents grudgingly provided support the conclusion that the Bush administration fired U.S. attorneys for bringing criminal prosecutions that hurt Republicans and for failing to bring criminal prosecutions that would hurt Democrats.

Elections have consequences, but elections in America should never have those consequences — not in the Harding administration, not in the Bush administration, not ever.

The Bush administration claims "executive privilege" in refusing to provide subpoenaed documents and testimony.

Court decisions recognize a privilege for some discussions between the president and some advisers about some decisions, but the Bush administration's claim goes well beyond any privilege ever recognized by any court.

More disturbing, the Bush administration contends that the president decides what is subject to executive privilege, and that Congress has no recourse from the president's decision. Congress' alternatives may be unattractive, but we are not without recourse.

In recent history, Congress has enforced our authority to take evidence by referring contempt charges to the U.S. attorney under an 1857 criminal statute.

There's not a lot of wiggle room in the statute: The House or the Senate may submit contempt charges to the U.S. attorney, "whose duty it shall be to bring the matter before the grand jury for its action."

The Bush administration announced, however, that the Justice Department will instruct the U.S. attorney not to prosecute contempt charges, regardless of the language of the statute, and it would be "futile" for Congress to submit a charge. One constitutional scholar called that claim of presidential power "Nixonian."

So is Congress now stymied?

No. Statutory contempt procedures are easier, but not necessary. The House and the Senate each have the inherent power to conduct a trial and to hold in custody someone found in contempt until the adjournment of Congress.

The House first conducted a trial for contempt in 1795. In 1821, the Supreme Court held that the power of the House and Senate to punish for contempt, while not specifically stated in the Constitution, was inherent in Congress' legislative powers and "vital to their exercise."

The Teapot Dome investigation a century later presented the same question, and the Supreme Court came to the same conclusion. "Experience has taught that mere requests for such information often are unavailing," the court said, "and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."

Anyone held in contempt by a trial in the House or Senate would have immediate recourse to the courts by a habeas corpus proceeding, and the courts would then decide the constitutional dispute between Congress and the administration. And anyone held in contempt would win immediate release by providing the subpoenaed information.

Try as we might, however, a trial in the House will not resemble a trial in court. It will rankle for fellow citizens to be incarcerated after a partisan debate and a divided vote, regardless of how clear the law, judicious our procedures or brief the incarceration. That's why Congress passed the contempt statute in 1857.

There may be a third option. Some court decisions say in passing that Congress could bring a lawsuit to decide a dispute over information subpoenaed in a congressional investigation, and the court could then order the administration to provide the information.

Courts generally avoid such fights, however. When the Reagan administration filed a similar lawsuit against Congress, the court refused to decide the case "until all possibilities for settlement have been exhausted."

At the very least, Congress must first submit statutory contempt charges, as futile as that might be, to get a hearing on a lawsuit.

Our democracy has survived for more than two centuries because each branch has challenged abuses of power by the other branches, even when the challenge was uncomfortable.

The House would greatly prefer to avoid confrontation with the president and compromise, as past Congresses and presidents have compromised in similar disputes.

The Bush administration is not given to compromise.

The Bush administration announced that the House may ask questions of some White House officials in private, without oath or transcript, but not about any discussions at the White House, and only if the House agrees that the officials would then not have to testify. That, the Bush administration proclaimed, is a fair compromise.

The House should go forward soberly, judiciously, on procedures that respect everyone's rights,

so that constitutional questions can be decided by the courts, not by presidential decree.

Congress can lose a court decision over what executive privilege covers and the republic will survive, but we cannot accept the administration's claim that the president alone decides. Our duty to the Constitution requires that we go forward.

Rep. Brad Miller (D-N.C.) is working closely with the House leadership on the contempt of Congress issue.